FILED

No. 06-706

IN THE

Supreme Court of the United States

ANTHONY ASH AND JOHN HITHON,

Petitioners,

v.

TYSON FOODS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether the test the Eleventh Circuit used to assess petitioners' "comparative qualifications" claim (*i.e.*, a claim in which a Title VII plaintiff relies solely on his or her superior qualifications to establish that an employer's reasons for a challenged promotion decision are pretextual), following instructions provided by this Court in *Ash* v. *Tyson Foods, Inc.*, __ U.S. __, 126 S. Ct. 1195 (2006) (*per curiam*), conflicts with the test used in other circuits, which uniformly require a showing of *markedly* superior qualifications, and employ a variety of substantively indistinguishable verbal formulations to express this requirement;

Whether this case is an appropriate vehicle for addressing any conflict, in view of the fact that petitioners did not argue that they were more qualified under the criteria the employer actually used to assess candidates, but rather that they were more qualified under the criteria they believe should have been used; and

Whether the Eleventh Circuit's unpublished, non-precedential, and fact-bound decision – holding that the District Court did not err in deciding that the totality of evidence presented at trial would not, as a matter of law, allow a reasonable jury to conclude that petitioner Ash satisfied his burden of proving that he was not hired on account of race, but that petitioner Hithon was entitled to a new trial – was erroneous.

RULE 26.9 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner states that IBP, Inc., currently known as Tyson Fresh Meats, Inc., is a subsidiary of Tyson Foods, Inc. (NYSE: TSN).

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BRIEF IN OPPOSITION

The petition should be denied because the Eleventh Circuit's unpublished and non-precedential decision raises no important question of federal law warranting this Court's review.

First, there is no conflict in the lower courts over the standard that applies to "comparative qualifications" claims – *i.e.*, claims in which a Title VII plaintiff relies solely on his or her qualifications to establish that an employer's reasons for a challenged promotion decision are a pretext for unlawful discrimination. In such cases, the courts of appeals uniformly require plaintiffs to show that their qualifications were *markedly* superior to those of the selected candidate. That the courts of appeals use different language to express this standard is not (contrary to petitioners' argument) evidence of a "circuit split." Indeed, the Eleventh Circuit's standard – that "disparities in qualifications must be of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question" – is the same as, or merely a semantic variation on, the standards employed by the First, Second, Fourth, Fifth, Sixth, Seventh, Ninth, Tenth, and District of Columbia Circuits.

Second, even if there were any substantive differences between the courts of appeals' standards, this case is an inappropriate vehicle for addressing the issue: Petitioners' real claim is that they were more qualified under the hiring criteria that they believe *should have been used*, not those that were actually used. Petitioners are thus making a "deviation from company policy" claim, not a "superior qualifications" claim.

Third, the Eleventh Circuit's evaluation of the District Court's holding in this case (*i.e.*, that the totality of the evidence at trial was insufficient, as a matter of law, to allow

a reasonable jury to conclude that petitioners satisfied their burden of proving that they were not promoted because of their race) was proper. This fact-bound determination, relying on well established standards of review in an unpublished, non-precedential opinion, does not create a conflict among the circuits, and does not otherwise warrant this Court's review.

STATEMENT OF THE CASE

Six plaintiffs, including petitioners Anthony Ash and John Hithon, filed a complaint that included claims of racial discrimination against Tyson Foods, Inc. ("Tyson" or "respondent"), under Title VII of the Civil Rights Act of 1964 and 42 U.S.C. § 1981. The District Court granted Tyson's motion for summary judgment as to all claims asserted by Ash and Hithon, except for their claims that they were discriminatorily denied promotions to Shift Manager positions in the Tyson plant in Gadsden, Alabama, in the Summer of 1995.

Petitioners' promotion claims were tried to a jury. Much evidence was presented about the financial status of the Gadsden plant. It was undisputed that the Gadsden plant was losing money (as much as $250,000 a week) and had been doing so for approximately two years.[1] Plant Manager Tom Hatley was assigned to the Gadsden plant with the specific instruction to "turn the plant around." One of Hatley's first actions as Plant Manager was to withhold wage increases for his two Shift Managers (both of whom were white), which caused both to resign and created the openings at issue in this case. Hatley had concerns over filling the vacant positions

[1] Petitioners argued that the plant was not in financial straits, but offered absolutely no evidence to support their argument other than Hithon's speculation: "I believe the plant was making money. . . . Because the plant was still running, and we had a job to go to everyday." (Tr. 163). Hithon admitted that he had no actual knowledge of the Gadsden plant's "bottom line." (Tr. 132, 198-99).

with persons who were members of management at the Gadsden plant during its declining financial performance, and stated that this was a principal consideration throughout the process. As for Hithon and Ash, who had both worked as Shift Superintendents (a position below Shift Manager) through the declining years, Hatley was concerned as to "what part did their leadership play in the poor performance."

The District Court made the following finding about Hatley's decision making:

> Hatley testified that he based his decisions on these factors: experience in the poultry industry in a successful plant; leadership and organizational skills; experience in more than one plant; having a college degree; and, as the primary consideration, Hatley's belief that it would be better to have as shift managers persons who were not associated with the badly-performing Gadsden facility. With respect to the latter, Hatley strongly relied on what he was told by others (references) in assessing current managers.

Pet. App. 23a.

Hatley ultimately selected two persons who had no connection to the leadership of the poorly performing Gadsden plant. Randy King was already a successful Shift Manager at another plant. Although he did not have a college degree, he came highly recommended by a Tyson Senior Vice President. Steve Dade transferred to Gadsden after Hatley arrived, having previously served in several capacities, including Assistant Plant Manager, at another plant. He was a former Lieutenant Colonel in the United States Marine Corps, had a master's degree in management and human relations, and won the approval of higher management at the Gadsden plant by virtue of his successful performance in special assignments. Like King, Dade received glowing

recommendations from his Complex Manager and two Tyson executives.

In contrast, one of Hithon's former Plant Managers, who had supervised Hithon for about eight years, advised Hatley that he "would most definitely not recommend" that Hithon be placed in the position. (Tr. 444-45). Hatley noted as additional negative considerations under his hiring criteria that Hithon had no experience outside the Gadsden plant and that he did not have a college degree. As for Ash, his only experience outside the Gadsden plant was his participation in a three-month training program at another plant. He had been a Shift Superintendent for only about one year, and did not have a college degree. Ash and Hithon were part of the Gadsden plant's management during its period of poor performance.

Petitioners sought to prove that Hatley's stated reasons for hiring Dade and King were pretextual. They argued at trial, in the Court of Appeals, and now here that their preferred criteria (seniority and experience in the Gadsden plant) should have been used in hiring the Shift Managers, and not the criteria Hatley actually used. Petitioners argued that Hatley's failure to follow a Tyson job description for the shift manager job was evidence of pretext. It is undisputed, however, that Hatley was not aware of that job description, and the criteria he used related closely to his mandate to improve the management of the plant. Petitioners also argued that Hatley did not follow two Tyson policies (the Seniority Policy and the Salary Administration Policy). Both policies, however, gave Hatley discretion to deviate from their requirements if there were important business reasons for doing so.

Hithon also argued that pretext was established in his case because Hatley's notes of Hithon's job interview appear in Hatley's Day-Timer on a date one day after the entry that reflects that the candidate selected (King) had accepted the offer. The District Court found, however, that "[t]he evidence shows that Hatley was not always orderly or punctual in his

note taking or the recording of his notes, but that is not evidence of discriminatory intent." Pet. App. 35a.

Petitioners also pointed to three occasions when Hatley allegedly referred to Hithon or Ash using the ambiguous term "boy," which petitioners perceived as racist comments: "Hey, boy;" "Boy, we've got to get going;" and, "Boy, you think you've got enough starch in those jeans. All you need is a pair of cowboy boots to go with it." (Tr. 148-50, 252, 284). Petitioners offered no evidence that Hatley had ever used any racial epithets or other comments that could be considered evidence of discrimination. (Tr. at 284). Both admitted, moreover, that Hatley was rude in his dealings with all workers, white and black. (Tr. at 151-52).

The case was submitted to the jury, and the jury ruled in favor of petitioners and awarded each $250,000 in compensatory damages and $1.5 million in punitive damages. Thereafter, Tyson filed post-trial motions requesting judgment as a matter of law and, in the alternative, a new trial. The District Court granted these motions, and found that the totality of evidence presented at trial would not allow a reasonable jury to conclude that petitioners satisfied their burden of proving that the reasons offered by Hatley for his decision were pretexts for intentional racial discrimination. Pet. App. 40a-42a.

On appeal to the Eleventh Circuit, petitioners pressed the same arguments they made to the District Court. The Eleventh Circuit affirmed in an unpublished, non-precedential *per curiam* opinion. It noted that an employer is "entitled to judgment as a matter of law where 'the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred.'" Pet. App. 13a (quoting *Reeves* v. *Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148 (2000)). It concluded that (1) the evidence of Hatley's isolated use of the word "boy" in conversations with Hithon and Ash was not evidence of racial

discrimination because it was not "modified by a racial classification like 'black' or 'white'"; (2) Hatley's deviation from company policy was not circumstantial evidence of racial discrimination unless "the rules were bent or broken to give a non-minority applicant an advantage"; and (3) the appellants failed to prove, based solely on their comparative qualifications for the job, that the hiring decision was pretextual, because "[p]retext can be established through comparing qualifications only when the disparity in qualifications is so apparent as virtually to jump off the page and slap you in the face." Pet. App. 14a-15a (internal quotation marks omitted).

The Eleventh Circuit decided, however, that Hithon presented sufficient evidence of pretext insofar as he proved that Hatley's notes in his Day-Timber regarding Hithon's interview appear on the page dated July 25, whereas the notes reflecting King's acceptance of the job appear on the page dated July 24. The Court thus affirmed judgment as a matter of law on Ash's claims, and remanded for a new trial on Hithon's claims (because, even though Hithon offered sufficient evidence to allow the jury to find pretext, there was insufficient evidence in the record to support the jury's award of compensatory and punitive damages).[2]

Ash and Hithon then petitioned this Court for a writ of certiorari. This Court granted the writ and, in a *per curiam* opinion, vacated the Eleventh Circuit's decision and remanded the case to the Court of Appeals for clarification. See *Ash* v. *Tyson Foods, Inc.*, __ U.S. __, 126 S. Ct. 1195 (2006) (*per curiam*). This Court noted that though "[t]he judgment of the Court of Appeals, and the trial court rulings it affirmed, may be correct in the final analysis," there were two errors in the Eleventh Circuit's analysis that merited vacatur. *Id.* at 1196.

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[2] Petitioners do not challenge the Court of Appeals' holding that Hithon is entitled to a new trial.

First, the Eleventh Circuit erred "[i]nsofar as [it] held that modifiers or qualifications are necessary in all instances to render the disputed term ["boy"] probative of bias." *Id.* at 1197. Rather, the word "boy" can be a racial epithet depending on "context, inflection, tone of voice, local custom, and historical usage." *Id.* Second, this Court concluded that the Eleventh Circuit's use of a colloquial expression ("so apparent as virtually to jump off the page and slap you in the face") as a legal standard for determining when comparative qualifications evidence alone is sufficient to establish pretext was "unhelpful and imprecise." *Id.* This Court observed that the Eleventh Circuit and other courts of appeals have articulated better standards, and noted specifically the Eleventh Circuit's standard in *Cooper* v. *Southern Co.*: "'[D]isparities in qualifications must be of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question.'" *Ash*, 126 S. Ct. at 1197 (quoting *Cooper* v. *Southern Co.*, 390 F.3d 695, 732 (11th Cir. 2004), *cert. denied*, 126 S. Ct. 478 (2005)).

Notably, this Court explained that its decision "should not be read to hold that petitioners' evidence necessarily showed pretext. The District Court concluded otherwise. It suffices to say here that some formulation other than the test the Court of Appeals articulated in this case would better ensure that trial courts reach consistent results." *Id.* at 1198. The Court remanded the case to the Eleventh Circuit to "determine in the first instance whether the two aspects of its decision here determined to have been mistaken were essential to its holding." *Id.*

On remand, the Eleventh Circuit considered carefully this Court's opinion and concluded that the two errors identified were not essential to its holding. In another unpublished, non-precedential *per curiam* opinion, the Eleventh Circuit explained that the lack of a racially specific modifier for Hatley's "boy" comments was not essential to its conclusion

that the District Court held properly that Ash and Hithon had not proved pretext based on those comments. Rather, the Court explained that the evidence at trial showed that the "boy" comments were "ambiguous stray remarks not uttered in the context of the decisions at issue," and to the extent they were circumstantial evidence of bias, they were insufficient, in light of the other evidence produced at trial, "to provide a reasonable basis for a finding of racial discrimination in the denial of the promotions." Pet. App. 5a. The Eleventh Circuit noted that the statements "were remote in time to the employment decision, totally unrelated to the promotions at issue, and showed no indication of general racial bias in the decision making process at the plant or by Hatley," and their probative value was thus limited by context. *Id.* The District Court did not, therefore, err in concluding that the alleged remarks were "insufficient evidence of bias in the circumstances of this case to overcome the articulated reasons for Hatley's decision." *Id.*

The Eleventh Circuit also explained that its use of the colloquial "slap you in the face" expression was not essential to its holding. The Court relied instead on the standard it announced in *Cooper* (cited with approval by this Court in *Ash*, see 126 S. Ct. at 1197), and concluded that the District Court did not err in finding that Ash and Hithon "did not meet their burden . . . to show that the disparities between their qualifications and the qualifications of King and Dade were 'of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff for the job in question.'" Pet. App. 7a (quoting *Cooper*, 390 F.3d at 732). Thus, while their qualifications could be probative, petitioners could not rely solely on their qualifications to prove pretext. The Court of Appeals reiterated that the uncontested evidence at trial proved that King and Dade were *better* qualified than Ash or Hithon under the relevant criteria: they "were not associated with the prior poor performance of the plant, they had

demonstrated leadership and management skills, they had superior recommendations, and they had experience in the poultry industry at more than one Tyson plant. The only negative – King's lack of a college degree – made him equally, but not less, qualified educationally than the plaintiffs." *Id.* at 5a-6a.

Petitioners now seek a second writ of certiorari.

REASONS FOR DENYING THE WRIT

There is no split in the circuits on either of the questions posed in the petition, nor was the Eleventh Circuit's decision erroneous in any respect. Rather, the Eleventh Circuit hewed carefully to this Court's instructions on remand, and there is simply no reason for this Court to re-review this case. The lower courts' fact-bound determinations, which are based on settled legal principles and set forth in unpublished and non-precedential opinions, do not warrant review.

I. ALL CIRCUITS APPLY THE SAME BASIC STANDARD TO PRETEXT CLAIMS BASED ON COMPARATIVE QUALIFICATIONS, AND THE ELEVENTH CIRCUIT'S STANDARD IS CONSISTENT.

Petitioners contend that review is warranted for two reasons: (1) the Eleventh Circuit supposedly used the same standard to judge their comparative qualification claims on remand that this Court rejected in *Ash*, and (2) there is a purported conflict among the courts of appeals as to the proper standard to apply to this type of claim. Neither proposition is correct.

A. The Eleventh Circuit applied the appropriate standard on remand.

Petitioners assert that the Eleventh Circuit's use of the *Cooper* standard on remand was "intransigent" because that standard is not "substantively different from the 'slap in the

face' standard rejected by this Court in *Ash*." Pet. at 10, 12. This is simply incorrect. Far from being "intransigent," the Court of Appeals did precisely what this Court instructed it to do: it abandoned its use of a colloquial expression as a legal standard and relied instead on a standard that "would better ensure that trial courts reach consistent results," *Ash*, 126 S. Ct. at 1198 – *i.e.*, the standard articulated in *Cooper*, which this Court cited as one of the alternative formulations the Eleventh Circuit could have used. Even if the Eleventh Circuit used the "slap you in the face" phrase in the past as a shorthand way of referring to the *Cooper* standard, see, *e.g.*, *Cooper*, 390 F.3d at 732, there is no question that it has stopped using the phrase as a legal standard in accord with this Court's instructions, and applied a proper standard (which this Court itself identified) on remand in this case.

B. There is no conflict among the circuits regarding the applicable standard for comparative qualification claims.

Following the guidance of this Court, the courts of appeals uniformly recognize that a Title VII plaintiff who seeks to establish pretext based *solely* on evidence of comparative qualifications must show that his or her qualifications were *markedly* superior to those of the candidate selected for a job or promotion. Although the lower courts have used different phrases to capture this concept, there is no meaningful difference between their various verbal formulations, and the Eleventh Circuit's *Cooper* standard is no exception.

1. All of the courts of appeals that have addressed the issue have concluded that a factfinder cannot base a finding of pretext solely on evidence of comparative qualifications unless the plaintiff establishes that his or her qualifications were markedly superior to those of the candidate who was hired. This requirement is compelled by this Court's recognition that Title VII "was not intended to diminish traditional management prerogatives." *Texas Dep't of Cmty. Affairs* v. *Burdine*, 450 U.S. 248, 259 (1981) (internal

quotation marks omitted). Accordingly, "[t]he fact that a court may think that the employer misjudged the qualifications of the applicants does not in itself expose him to Title VII liability, although this may be probative of . . . pretext[]." *Id.*; see also *Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 243 (1989) ("[T]he very purpose of Title VII is to promote hiring on the basis of job qualifications, rather than on the basis of race or color." (internal quotation marks and citations omitted)).

In compliance with these instructions, the courts of appeals seek to ensure that courts and juries do not act as "super personnel departments" that second guess good faith business judgments. Because it is in the employer's interest to select the most qualified applicant, an employer's judgment about qualifications is assumed to be made in good faith.

As the First Circuit has explained,

> in the absence of strong objective evidence (e.g., test scores), proof of competing qualifications will seldom, in and of itself, be sufficient to create a triable issue of pretext. . . . This result follows from a form of the business judgment rule. . . . Qualifications are notoriously hard to judge and, in a disparate treatment case, more must be shown than that the employer made an unwise personnel decision by promoting "X" ahead of "Y." . . . In other words, subjective evidence of competing qualifications seldom provides a principled way for a factfinder to determine whether a given employment decision, even if wrong-headed, was anything more than a garden-variety mistake in corporate judgment.

Rathbun v. *Autozone, Inc.*, 361 F.3d 62, 74 (1st Cir. 2004) (internal quotation marks and citations omitted); see also *Byrnie* v. *Town of Cromwell*, 243 F.3d 93, 103 (2d Cir. 2001) ("[T]he court must respect the employer's unfettered

discretion to choose among qualified candidates (. . . and not to act as a super personnel department that second guesses employers' business judgments)." (internal quotation marks and citations omitted)); *Ezold* v. *Wolf, Block, Schorr & Solis-Cohen*, 983 F.2d 509, 527 (3d Cir. 1992) (same); *Anderson* v. *Westinghouse Savannah River Co.*, 406 F.3d 248, 272 (4th Cir. 2005), *cert denied*, 126 S. Ct. 1431 (2006) (same); *Scott* v. *Univ. of Miss.*, 148 F.3d 493, 509 (5th Cir. 1998), *abrogated in part on other grounds by Kimel* v. *Fla. Bd. of Regents*, 528 U.S. 62 (2000) (same); *Millbrook* v. *IBP*, 280 F.3d 1169, 1181 (7th Cir. 2002) (same); *Duffy* v. *Wolle*, 123 F.3d 1026, 1038 (8th Cir. 1997) (same); *Peters* v. *Lieuallen*, 746 F.2d 1390, 1393 (9th Cir. 1984) (same); *Bullington* v. *United Air Lines, Inc.*, 186 F.3d 1301, 1318 n.14 (10th Cir. 1999) (same); *Wilson* v. *B/E Aerospace, Inc.*, 376 F.3d 1079, 1092 (11th Cir. 2004) (same); *Fischbach* v. *D.C. Dep't of Corr.*, 86 F.3d 1180, 1183 (D.C. Cir. 1996) (same).

2. Accordingly, to prevent second-guessing of presumptively good faith business decisions, the courts have insisted that plaintiffs who seek to show pretext based *solely* on a comparison of qualifications must demonstrate that their own qualifications were markedly superior. The lower courts have expressed this requirement in different ways, but their expressions all serve the same purpose, and do not differ in substance. The First Circuit requires that a plaintiff's "qualifications [be] *so obviously superior* to those of the successful . . . applicants as to undermine the legitimacy of the selection process." *Rathbun*, 361 F.3d at 75 (emphasis added). The Second Circuit requires that a "plaintiff's credentials . . . be *so superior . . . that 'no reasonable person in the exercise of impartial judgment, could have chosen the candidate selected.'*" *Byrnie*, 243 F.3d at 103 (quoting *Deines* v. *Tex. Dep't of Protective & Regulatory Servs.*, 164 F.3d 277, 280-81 (5th Cir. 1999)) (emphasis added). In the Fourth Circuit, a plaintiff must have "qualifications . . . so *plainly superior* that the employer *could not have preferred*

another candidate." *Dennis* v. *Columbia Colleton Med. Ctr.*, 290 F.3d 639, 648 n.4 (4th Cir. 2002) (emphases added). The Fifth Circuit, in addition to using the standard in *Deines* quoted above, has explained that there must be a "'*glaring distinction*' that would reasonably support a conclusion that [the plaintiff] was *clearly* better qualified" than the applicant selected. *Scott*, 148 F.3d at 509 (emphases added). The Sixth Circuit requires that "the rejected applicant's qualifications must be *so significantly better* than the successful applicant's qualifications that *no reasonable employer would have chosen the latter applicant over the former*." *Bender* v. *Hecht's Dep't Stores*, 455 F.3d 612, 627 (6th Cir. 2006) (emphases added). The Seventh Circuit requires "differences [that] are so favorable to the plaintiff *that there can be no dispute among reasonable persons* of impartial judgment that the plaintiff was *clearly* better qualified." *Millbrook*, 280 F.3d at 1179 (internal quotation marks omitted) (emphases added). In the Ninth Circuit, the "plaintiff's qualifications [must be] *clearly superior* to the qualifications of the applicant selected." *Odima* v. *Westin Tucson Hotel*, 53 F.3d 1484, 1492 (9th Cir. 1995) (emphasis added). The Tenth Circuit has held that "the disparity in qualifications must be '*overwhelming*' to be evidence of pretext." *Bullington*, 186 F.3d at 1319 (10th Cir. 1999) (citation omitted) (emphasis added). And the District of Columbia Circuit requires that "a reasonable employer would have found the plaintiff to be *significantly better qualified* for the job." *Aka* v. *Washington Hosp. Ctr.*, 156 F.3d 1284, 1294 (D.C. Cir. 1998) (*en banc*) (emphasis added).

The Eleventh Circuit's standard does not conflict with the foregoing formulations. It is instead largely identical to the tests used by the Second, Fourth, Fifth, Sixth and Seventh Circuits, and is the same substantively as those in the First, Ninth, Tenth, and District of Columbia Circuits. All of these courts require that a plaintiff who relies solely on his

qualifications as evidence of pretext prove he was markedly better qualified for the job than the applicant who was hired.

3. Just as they did in their first petition, petitioners attempt to manufacture a conflict from variations in the foregoing language. They ignore the standards applied by the First, Second, and Tenth Circuits, and try to group the remaining circuits on a spectrum they have invented based on supposed variations in the restrictiveness of the different courts' approaches: the Third, Fourth, and District of Columbia Circuits employ "intermediate standards," Pet. at 11, that fall between the supposed poles of the Fifth and Eleventh Circuits (as the most restrictive) and the Sixth and Ninth Circuits (as the least restrictive), with the Seventh Circuit using an unusual "hybrid approach." *Id.* at 21.

This effort suffers from three fundamental flaws: (1) petitioners' groupings of the circuits are arbitrary, as the circuits apply substantively the same standard; (2) petitioners completely misunderstand (or ignore) the distinction between plaintiffs who seek to prove pretext based *solely* on their qualifications, and those who use qualifications as one *type* of probative evidence, often comparing cases between these two distinct categories as a way of demonstrating a supposed "circuit split"; and (3) petitioners assume the circuits employ different standards based on differences in the number of published opinions in which plaintiffs have succeeded, and then compound this error by making the circular argument that the different standards are "outcome determinative."

a. Neither the Sixth Circuit nor the Ninth Circuit allow the freewheeling use of comparative qualification evidence that petitioners suggest. In the Ninth Circuit, a plaintiff who seeks to establish pretext based solely on his qualifications must prove that his "qualifications [are] *clearly superior* to the qualifications of the applicant selected." *Odima*, 53 F.3d at 1492 (emphasis added). Petitioners cite *Raad* v. *Fairbanks North Star Borough School District*, 323 F.3d 1185 (9th Cir. 2003), but do not explain how that case is

evidence of a lesser standard; indeed, the Court in *Raad* reaffirmed its use of the "clearly superior" test, *id.* at 1194, and did not distinguish, or even mention, the Eleventh Circuit's standard.[3] The Court certainly did not suggest that, although the plaintiff in that case satisfied the "clearly superior" test of *Odima*, her qualifications for the teaching position she sought (a graduate degree and "outstanding faculty recommendations" from her state teachers program) would not have satisfied the "no reasonable person, in the exercise of impartial judgment" test of *Cooper*.[4]

Petitioners also cite two unpublished memorandum decisions for the fanciful proposition that the Ninth Circuit allows evidence of *equal* qualifications to be the sole basis for a finding of pretext. For one thing, these unpublished decisions – *Margolis* v. *Tektronix, Inc.*, 44 Fed. App'x 138 (9th Cir. 2002) (*per curiam*), and *Tucevich* v. *Nevada*, No. 97-16713, 1999 WL 62735 (9th Cir. Jan. 22, 1999) (*per curiam*) – do not establish Circuit precedent. See 9th Cir. Local R. 36-3(a). But in any event, in *Tucevich* there were many types of evidence supporting a finding of discrimination, and thus the jury would not have been asked

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[3] The Ninth Circuit expressed discomfort with the use of the "slap you in the face" phrase with which this Court disagreed in *Ash*, *see Raad*, 323 F.3d at 1194, but this *dicta* surely does not create a circuit split, since the Eleventh Circuit no longer uses that aphorism, and the substance of the Ninth Circuit's "clearly superior" test is no different from the Eleventh Circuit's *Cooper* test.

[4] The standards are, in fact, indistinguishable. In *Lee* v. *GTE Florida, Inc.*, 226 F.3d 1249 (11th Cir. 2000), the Eleventh Circuit applied its "no reasonable person, in the exercise of impartial judgment" standard, and concluded that the plaintiff did not meet her burden of proving pretext because her "evidence at the trial fell far short of establishing that she was *clearly more qualified* for the position" than the applicant who was selected. *Id.* at 1254-55 (emphasis added). Thus, the Eleventh Circuit itself has equated its standard with "clearly more qualified," which is identical to "clearly superior."

to find pretext based *solely* on "equal" qualifications.[5] And insofar as *Margolis* suggests that "[a] jury could find . . . a pretext for discrimination if it believes that Margolis was, in fact, more (or at least as) qualified than" the applicant who was hired, 44 Fed. App'x at 142-43, that is plainly an incorrect statement of the Ninth Circuit's standard for finding pretext based solely on qualifications evidence, which requires that the plaintiff's qualifications be "clearly superior." See, *e.g.*, *Raad*, 323 F.3d at 1194; *Odima*, 53 F.3d at 1492. To the extent there is a "conflict" between one of the Ninth Circuit's unpublished, non-precedential memorandum opinions and longstanding Ninth Circuit precedent, that is a matter for the Ninth Circuit to resolve, not this Court.

Nor do petitioners cite precedent from the Sixth Circuit that is contrary to the uniform rule in other circuits. Indeed, they do not cite *at all* the leading Sixth Circuit case, *Bender* v. *Hecht's Department Stores*, 455 F.3d 612 (6th Cir. 2006), in which the Court held squarely that when a plaintiff relies *solely* on qualifications evidence to establish pretext, "the rejected applicant's qualifications must be *so significantly better* than the successful applicant's qualifications that *no reasonable employer would have chosen the latter applicant over the former*." *Id.* at 627 (emphases added).

Instead, petitioners cite yet another unpublished memorandum decision – *Jenkins* v. *Nashville Public Radio*, 106 Fed. App'x 991 (6th Cir. 2004) – that does not establish Sixth Circuit precedent. See 6th Cir. I.O.P. R. 206(c). *Jenkins*, moreover, held merely that the plaintiff's evidence of superior qualifications, combined with other evidence such as irregularities in the application process, was *probative* of pretext, and that the totality of the evidence could have been

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[5] This highlights the second fundamental flaw in petitioners' argument: they conflate the standard for proving pretext based *solely* on qualifications evidence with the standard for relying on such evidence as part of a mosaic of other evidence of discrimination. We address this issue in Section I.B.3.b below.

sufficient *collectively* to permit a jury to return a verdict for the plaintiff. *Jenkins*, 106 Fed. App'x at 994-95. As the Sixth Circuit made clear in the precedential *Bender* opinion (which petitioners ignore), *Jenkins* applies *only* in situations where qualifications evidence is presented as part of an overall tapestry of evidence that, taken as a whole, tends to prove discrimination. *Bender*, 455 F.3d at 626-27.

Petitioners also contend that three courts of appeals – the Third, Fourth, and District of Columbia Circuits – apply an "intermediate" standard. As for the Fourth and District of Columbia Circuits, petitioners simply assert that the standards employed by those Circuits are "more demanding than that in the Ninth Circuit . . . but less demanding than that in the Eleventh and Fifth Circuits," but do not explain why. Pet. at 20. They do not explain how the District of Columbia Circuit's "significantly better qualified" standard, see *Aka*, 156 F.3d at 1294, differs in any meaningful way from the Ninth Circuit's "clearly superior" qualifications standard, see *Odima*, 53 F.3d at 1492, or how either of these standards is substantively different from the Eleventh Circuit's "no reasonable person, in the exercise of impartial judgment" standard, see *Cooper*, 390 F.3d at 732. They also offer no explanation of why the Fourth Circuit's standard ("qualifications were so plainly superior that the employer could not have preferred another candidate," see *Dennis*, 290 F.3d at 648 n.4) is more or less demanding than the tests used by the First, Second, Fifth, Sixth, Seventh, Ninth, Tenth, Eleventh, and District of Columbia Circuits.

As for the Third Circuit, it has not addressed this question directly. In *Bray* v. *Marriott Hotels*, 110 F.3d 986 (3d Cir. 1997), the Court held only that the plaintiff could submit evidence of her qualifications to a jury because there were several "evidentiary discrepancies" (gleaned from the Court's consideration of the "totality of the evidence") from which a reasonable jury might conclude that the employer's reasons for not promoting the plaintiff were pretextual – including,

inter alia, superior qualifications. *Id.* at 991, 993-97. But the Court did not articulate a standard for cases in which a plaintiff relies *only* on qualifications evidence, and did not contrast this with a situation where several types of probative evidence are offered. Petitioners summarize the case (and then-Judge Alito's dissent), but do not explain how the Third Circuit's decision is inconsistent with any other circuit.

Petitioners do not cite a *single case* in which a circuit conflict is evident, and their attempt to group the circuits along an invented spectrum of supposed restrictiveness is artificial and arbitrary.

b. As the foregoing discussion makes clear, petitioners' artificial categorization of the circuits is flawed for a second fundamental reason: they repeatedly confuse the standards for pretext claims based *solely* on qualifications evidence and pretext claims based on a *variety* of evidence, in which the plaintiff's qualifications are but one part of a mosaic that, as a whole, is evidence of discrimination. As the Sixth Circuit explained in *Bender*,

> [A]cknowledging that evidence of comparative qualifications "may be probative" of pretext is a far cry from holding that such evidence is itself sufficient in all cases to raise a genuine issue of fact of discriminatory motive. . . .
>
> Whether qualifications evidence will be sufficient to raise a question of fact as to pretext will depend on whether a plaintiff presents other evidence of discrimination. In the case in which a plaintiff does provide other probative evidence of discrimination, that evidence, taken together with evidence that the plaintiff was as qualified as or better qualified than the successful applicant, might well result in the plaintiff's claim surviving summary judgment. . . . On the other hand, in the case in which there is little or no other probative

> evidence of discrimination, to survive summary judgment the rejected applicant's qualifications must be so significantly better than the successful applicant's qualifications that no reasonable employer would have chosen the latter applicant over the former.

455 F.3d at 626-27 (citation omitted).

The circuits uniformly require a plaintiff who seeks to establish pretext based *solely* on his superior qualifications to show that his qualifications were *markedly* superior, in keeping with courts' reluctance to second-guess employers' business decisions. But no circuit requires such a showing if qualifications evidence is used, with other evidence, as simply *probative* of discrimination. See, *e.g.*, *Rathbun*, 361 F.3d at 75 (1st Cir.) (explaining that even if a plaintiff's qualifications are not "obviously superior," "a claimed difference in qualifications may [still] be sufficient to ground an action if accompanied by independent evidence"); *Byrnie*, 243 F.3d at 103 (2d Cir.) (same, and explaining that "just because the discrepancy between [the] qualifications does not on its own have the strength to create a material issue of fact, that does not mean the discrepancy is stripped of all probative value"); *Bray*, 110 F.3d at 993-97 (3d Cir.) (same); *Dennis*, 290 F.3d at 648 (4th Cir.) (same); *David* v. *Caterpillar, Inc.*, 324 F.3d 851, 861-62 (7th Cir. 2003) (same); *Bullington*, 186 F.3d at 1319 (10th Cir.) (explaining that "a comparative analysis of job applicants' qualifications may be relevant in proving pretext," but cannot *alone* prove pretext unless "[t]he disparity in qualifications [is] 'overwhelming'"); cf. *Aka*, 156 F.3d at 1295 (D.C. Cir.) (noting that "[a] plaintiff attacking a qualifications-based explanation is of course not limited to comparing his qualifications against those of the successful candidate. The plaintiff can instead seek to expose other flaws in the employer's explanation [which] may suffice to permit a jury to infer that the employer's explanation is incorrect or fabricated, and thus to infer discrimination.").

The Eleventh Circuit is not an exception. See, *e.g.*, *Lee* v. *GTE Fla., Inc.*, 226 F.3d 1249, 1253 (11th Cir. 2000) (explaining that while "a plaintiff cannot prove pretext by *simply showing* that she was better qualified than the individual who received the position that she wanted, . . . evidence showing an employer hired a less qualified applicant over the plaintiff may be *probative* of whether the employer's proffered reason for not promoting the plaintiff was pretextual" (emphases added)). Indeed, in the Eleventh Circuit's first decision in this case, it explained that Ash's and Hithon's evidence of their qualifications was "probative of whether the employer's reasons [were] pretextual," even though it was not alone "proof of pretext." Pet. App. 15a. And the Eleventh Circuit ruled that Hithon was entitled to a new trial *because* he submitted enough probative evidence – *including* his qualifications and the evidence suggesting that Hatley interviewed him after King had already accepted the job – to prove pretext.

Thus, petitioners' comparison of Ninth Circuit cases involving several types of probative evidence (which are subject to a less demanding standard in every circuit) and Eleventh Circuit cases in which plaintiffs sought to prove pretext based on their qualifications alone (which are subject to a more demanding standard in every circuit) does not reflect a circuit split at all. It simply reflects petitioners' failure to recognize a critical legal distinction.[6] This

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[6] Petitioners' misunderstanding is demonstrated further by their argument that the Seventh Circuit applies a "hybrid" standard. They contend, correctly, that the Seventh Circuit uses the same standard as the Eleventh Circuit (and other circuits) "[w]here a plaintiff relies *solely* on evidence of comparative qualifications," and uses a less restrictive standard (which petitioners label the "Ninth Circuit standard") "where the plaintiff has other evidence (albeit evidence not by itself sufficient to support a finding of discrimination)." Pet. at 21-22. *Compare Millbrook*, 280 F.3d at 1179 (7th Cir.) (holding that a plaintiff may prove pretext based solely on qualifications if the "differences are so favorable to the plaintiff that there can be no dispute among reasonable persons of

distinction, moreover, was not fashioned out of whole cloth by the courts of appeals. Rather, it is compelled by this Court's holding in *Burdine*:

> [Title VII] was not intended to "diminish traditional management prerogatives." . . .
>
> The views of the Court of Appeals [pre-*Burdine*] can be read, we think, as requiring the employer to hire the minority or female applicant whenever that person's objective qualifications were equal to those of a white male applicant. *But Title VII does not obligate an employer to accord this preference.* Rather, the employer has discretion to choose among equally qualified candidates, provided the decision is not based upon unlawful criteria. *The fact that a court may think that the employer misjudged the qualifications of the applicants does not in itself expose him to Title VII liability*, although this may be *probative* of whether the employer's reasons are pretexts for discrimination.

450 U.S. at 259 (emphases added).

Petitioners' failure to grasp this distinction undermines further their "grouping" of the circuits' standards into various artificial categories.

c. Finally, petitioners attempt to prove a circuit split based on the success that individual plaintiffs have had among the circuits. They claim that the circuits' standards,

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impartial judgment that the plaintiff was clearly better qualified"), *with David*, 324 F.3d at 863 (7th Cir.) ("The *Millbrook* standard is controlling in cases in which the plaintiff relies exclusively on evidence of the applicants' comparative qualifications; however, it is not controlling where the plaintiff offers other evidence . . . in addition to the differences in relative qualifications."). Of course, as explained, this rule is not unique to the Seventh Circuit, and the other circuits recognize the same critical distinction.

which are largely identical in language and entirely identical in substance, are nonetheless in "conflict" *because* some plaintiffs have succeeded under those standards while others have failed. From this, petitioners conclude that the standards are different and "outcome determinative." In other words, petitioners identify cases in which a plaintiff has succeeded in one circuit and a different plaintiff (relying on different facts) has failed in another, and, reasoning backward, they conclude that the reason for the different results must be that the legal standards used in those circuits are substantively different. They then make the circular argument that the different standards produce different outcomes.

They claim, for example, that the standards in the Fifth and Eleventh Circuits are "fatal in practice" because petitioners have only identified two cases between those circuits in which plaintiffs have succeeded in establishing pretext based solely on comparative qualifications,[7] whereas the Fourth Circuit (which, as noted, employs a standard expressed in terms that are substantively identical to the Fifth and Eleventh Circuits) is "intermediate." The only reason petitioners give for this distinction is that the Fourth Circuit in *Dennis* upheld a jury's finding of discrimination based on the plaintiff's qualifications evidence. The District of Columbia Circuit, too, is given the "intermediate" label because it overturned a summary judgment award for defendants based on the plaintiff's qualifications evidence in *Aka*. But petitioners do

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[7] Of course, this approach is flawed empirically. It ignores the realities of the court system and presupposes that published opinions represent the entire universe of cases that have involved the issue at hand. Obviously, in those cases where a court has concluded that sufficient qualifications evidence was presented by the plaintiff to survive summary judgment, the result would be the issuance of a non-appealable order. Undoubtedly, there are numerous cases in which courts have found the plaintiff's qualifications evidence to be sufficient but there is no published opinion reflecting that holding because the cases have settled, were tried to verdict without appeal or were otherwise resolved without an appeal or published decision.

not explain why the District of Columbia Circuit's "significantly better qualified" standard is equivalent to the Fourth Circuit's "qualifications so plainly superior that the employer could not have preferred another candidate" standard, but differs from the standards of the Second, Fifth, Sixth, Seventh, and Eleventh Circuits, all of which have adopted language similar to the Fourth Circuit, and substantively identical to the rest. The mere fact that plaintiffs have prevailed in some circuits based on the unique facts in their cases is plainly not evidence that the standards themselves differ.

Similarly, petitioners cite a number of cases from the Ninth Circuit (most of them unpublished and non-precedential), and a few from the Sixth Circuit, in which plaintiffs have purportedly survived a motion for summary judgment. These cases are simply irrelevant, since they either do not involve Title VII, or are yet more examples of cases in which plaintiffs relied on their qualifications as one type of probative evidence, not the only evidence of pretext.[8] But in

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[8] Of the published Ninth Circuit opinions petitioners cite – *Cornwell* v. *Electra Central Credit Union*, 439 F.3d 1018 (9th Cir. 2006), *Godwin* v. *Hunt Wesson, Inc.*, 150 F.3d 1217 (9th Cir. 1998), and *Lindahl* v. *Air France*, 930 F.2d 1434 (9th Cir. 1991) – *none* involved claims that a plaintiff's allegedly superior qualifications were alone sufficient to sustain a finding of pretext. Rather, in all three cases, the Court simply noted that evidence that the plaintiff was qualified for the job was, in conjunction with other evidence of discrimination, *probative* of pretext. *Cornwell*, 439 F.3d at 1033-34; *Godwin*, 150 F.3d at 1222; *Lindahl*, 930 F.3d at 1439.

Petitioners also cite several Sixth Circuit decisions, many of them unpublished and non-precedential. Of the published decisions, *Zambetti* v. *Cuyahoga Community College*, 314 F.3d 249 (6th Cir. 2002), merely held that evidence of superior qualifications was probative of pretext when "coupled with" other evidence, *id.* at 260, and *Glenn's Trucking Co.* v. *N.L.R.B.*, 298 F.3d 502 (6th Cir. 2002), did not even involve Title VII at all, but rather an unfair labor charge under the National Labor Relations Act that only required proof that union applicants were "qualified" for the jobs they sought. *Id.* at 506. And, as noted, petitioners do *not* cite *Bender*, in which the Sixth Circuit held squarely (in keeping with the rule

any event, given the unique factual circumstances of every discrimination case, any hypothetical difference in the number of published opinions among the circuits favoring plaintiffs is not evidence of a circuit split, and surely cannot be relied upon for the tautological argument that supposedly different standards are "outcome determinative."[9]

II. EVEN IF THERE WERE SUBSTANTIVE DIFFERENCES AMONG THE CIRCUITS, THIS CASE IS AN INAPPROPRIATE VEHICLE FOR ADDRESSING THE ISSUE.

Even if there were substantive differences between the standards for comparative qualifications evidence used in different circuits – and there plainly is not – this case does not present an appropriate occasion for this Court to resolve the issue. Petitioners do not claim that they were more qualified under the criteria that were actually used in this case. Instead, they claim they were more qualified under the standards they believe *should* have been used, which is a claim of pretext

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in other circuits) that a plaintiff who seeks to prove pretext based *solely* on superior qualifications must show that his "qualifications [were] so significantly better than the successful applicant's qualifications that no reasonable employer would have chosen the latter applicant over the former." *Bender*, 455 F.3d at 627.

[9] Petitioners also argue that "the court" decides qualifications in some circuits, while "the trier of fact" decides them in others. *See, e.g.*, Pet. at 18-20. To make this distinction, they cite some cases in which courts have held that sufficient evidence (usually qualifications evidence combined with other evidence) existed to allow a jury to find for the plaintiff, and contrast these to cases in which courts have held that the evidence (usually qualifications evidence standing alone) was insufficient. Such factual differences, especially insofar as petitioners compare two completely different types of standards, do not give rise to a circuit split. Moreover, as explained in greater detail in Section III below, to the extent petitioners argue that the jury should be the *sole* arbiter of whether the evidence is sufficient to support pretext, their argument has been rejected explicitly by this Court, which recognized in *Reeves* that courts *should* grant judgment as a matter of law in cases like this one. *See Reeves*, 530 U.S. at 148-49.

based on the company's alleged deviation from its policies, not a superior qualifications claim.

The evidence of supposedly superior qualifications on which petitioners rely consists primarily of their long service at the Gadsden plant in positions below the level of Shift Manager. Pet. at 5. They do *not* contend that they were more qualified (or even as qualified) under the hiring criteria the decision maker, Mr. Hatley, actually used; in fact, both the District Court and the Court of Appeals concluded that petitioners were clearly *less* qualified under those criteria. See Pet. App. 5a-6a, 32a-33a.

This debate over decisional criteria precludes consideration of the first question petitioners raise in their petition. If Hatley in fact applied his stated criteria, then petitioners were not better qualified, let alone markedly so, and the question of superior qualifications is not presented at all. Conversely, if Hithon can demonstrate on remand that Hatley's claimed reliance on these criteria was actually a pretext *without* proving his qualifications were markedly superior (as the Court of Appeals held), there will be no need to address the relative qualifications of Hithon and the successful applicants, because pretext will already have been shown.

Nor is the question presented in Ash's case. In the proceedings below, it was "Ash's position, and the evidence is uncontroverted, that Hatley did not consider [him] for either shift manager opening." Pet. App. 25a. In the absence of any actual comparison of qualifications by the decision maker, there is simply no occasion in this case for deciding what degree of superiority in qualifications would be sufficient to establish pretext.

III. THE ELEVENTH CIRCUIT'S EVALUATION OF THE ALLEGEDLY BIASED REMARKS IN THIS CASE WAS PROPER.

Petitioners argue that the Eleventh Circuit, out of some inexplicable "determination to find some reason to again

overturn the jury's finding of discrimination," flouted Supreme Court precedent and ran roughshod over established review standards. The Eleventh Circuit did no such thing.

In *Ash*, this Court instructed the Eleventh Circuit to reconsider its erroneous suggestion that Hatley's three uses of the word "boy" when addressing Ash and Hithon were not evidence of discrimination because they were not accompanied by a racial qualifier, and to decide whether this reasoning was "essential" to the holding. The Eleventh Circuit decided it was not.

In its first decision, the Eleventh Circuit noted explicitly that potentially racial statements could be circumstantial evidence of pretext, see Pet. App. 14a, and acknowledged on remand that the use of the word "boy" when addressing black men "is considered to have general racial implications," *id.* at 5a. But the Court of Appeals held, applying well established standards of review, that the District Court did not err in concluding that, as a matter of law, "the 'boy' comments, with the other evidence presented, do not provide a reasonable basis for a finding of racial discrimination in the context of the employment decisions at issue . . . ." *Id.* at 6a.

Petitioners cite several cases, from this Court and the courts of appeals, for the unremarkable proposition that statements that could be evidence of bias should be interpreted by the trier of fact. See, *e.g.*, *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 577 (1985). But instead of improperly removing the interpretation of the stray remarks in this case from the province of the jury, the courts below performed a function this Court has long recognized as appropriate: based on the totality of the evidence presented at trial, and considering the strength of petitioners' evidence and its probity (based on context), the courts concluded that this evidence of pretext was insufficient, as a matter of law, to overcome the overwhelming evidence at trial that Hatley hired the best candidates for the jobs using reasonable, nondiscriminatory criteria.

As this Court has explained,

> [w]hether judgment as a matter of law is appropriate in any particular case will depend on a number of factors. Those include the strength of the plaintiff's prima facie case, the probative value of the proof that the employer's explanation is false, and any other evidence that supports the employer's case and that properly may be considered on a motion for judgment as a matter of law.
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> * * *
>
> [A]n employer would be entitled to judgment as a matter of law if the record conclusively revealed some other, nondiscriminatory reason for the employer's decision, or if the plaintiff created only a weak issue of fact as to whether the employer's reason was untrue and there was abundant and uncontroverted independent evidence that no discrimination had occurred.

Reeves, 530 U.S. at 148-49.

Petitioners proposed rule – that the jury should be the *sole* arbiter of whether the evidence is sufficient to prove pretext, and any court that overturns such a finding exceeds its authority – is thus incorrect. Indeed, this Court has stated clearly that courts *should* grant judgment to defendants as a matter of law in circumstances such as these, notwithstanding jury verdicts to the contrary. "To hold otherwise would be effectively to insulate an entire category of employment discrimination cases from review under Rule 50, and we have reiterated that trial courts should not 'treat discrimination differently from other ultimate questions of fact.'" *Reeves*, 530 U.S. at 148 (quoting *St. Mary's Honor Ctr.* v. *Hicks*, 509 U.S. 502, 524 (1993)) (internal quotation marks omitted).

Nonetheless, petitioners persist in arguing that the Eleventh Circuit substituted its findings of fact for the jury's. They allege that the Eleventh Circuit (1) held that the ambiguity of Hatley's "boy" remarks "precludes a trier of fact from relying on [that] evidence"; (2) concluded that the comments had "no racial intent" based solely on the "cold transcript"; (3) deemed the remarks "legally irrelevant" because they were not made in the context of Hatley's employment decision; and (4) held that such comments "can never be probative." Pet. at 24-26. None of this language, however, appears in the Eleventh Circuit's opinion, and the Eleventh Circuit's *actual* holding is very different. Moreover, petitioners' arguments confuse the role of a factfinder with the role of a court addressing a motion for judgment as a matter of law; as this Court made clear in *Reeves*, a court does not intrude impermissibly in the jury's realm by discharging its review function under Federal Rule of Civil Procedure 50.

The Eleventh Circuit held, consistent with *Reeves*, that the District Court did not err in granting Tyson judgment as a matter of law on Ash's claim, because the evidence of racial discrimination in hiring, considered in its context, and though probative to some degree, was simply insufficient as a matter of law to allow a reasonable jury to find in his favor. Hithon, on the other hand, offered sufficient evidence of pretext – the "boy" comments, his qualifications, *and* the evidence suggesting that Hatley interviewed him after filling the position. All of this evidence was probative, and while the first two types of evidence, considered in their context, were not sufficient to satisfy Hithon's burden of proof, when combined with the third they were enough, in the Eleventh Circuit's view, to support a jury verdict in his favor.[10]

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[10] The Eleventh Circuit concluded, however, that there was insufficient evidence to support the jury's award of compensatory and punitive damages, and thus it was appropriate to remand Hithon's case for a new trial rather than simply reinstate the jury's verdict. Petitioners do not challenge this holding in their petition.

Petitioners argue that, regardless, the evidence of their qualifications and Hatley's comments supported their claims and the jury's verdict in their favor should be reinstated. But the fact-bound determination that such evidence in this particular case was insufficient to sustain a finding of discrimination does not warrant review. Petitioners did not, for example, provide any other evidence of racial hostility at the plant,[11] and although petitioners argued that they had an appropriate level of seniority and satisfied the general job description of the Shift Manager position, they did not offer *any* evidence that Hatley's criteria – including experience at other successful plants, lack of association with the many problems at the Gadsden plant, a college degree, and good recommendations – were themselves pretextual. In fact, the evidence presented at trial of the problems with the Gadsden plant overwhelmingly supported Hatley's testimony that he was trying to reverse the plant's downward slide by hiring Shift Managers with the qualifications just described. It was also uncontested that, under those criteria, Ash and Hithon were not qualified for the positions, or at least were less qualified than the successful applicants (one of whom was already a Shift Manager at a successful Tyson plant, the other of whom had been an Assistant Plant Manager at another plant and had a master's degree in management and human relations, and both of whom came very highly recommended by Tyson executives).

In short, the Eleventh Circuit held properly that the District Court did not err in concluding that the totality of the evidence produced at trial was not sufficient to allow a reasonable jury to conclude that Ash satisfied his burden of proving that Hatley's hiring decision was discriminatory, but Hithon did provide sufficient evidence of pretext when his

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[11] For example, petitioners offered no evidence that Hatley ever used racial epithets or made other comments that could be considered discriminatory. (Tr. at 284). Both admitted, moreover, that Hatley was rude in his dealings with all workers, white and black. (Tr. at 151-52).

qualifications and Hatley's comments were considered along with the evidence that Hithon was interviewed after King was hired. To the extent the District Court and Eleventh Circuit concluded that petitioners' evidence related to the "boy" comments was too equivocal to overcome, on its own, the compelling evidence that supported Hatley's hiring decision, there is simply no reason for this Court to review that fact-bound determination.

CONCLUSION

For the foregoing reasons, respondent requests that this Court deny the petition.

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